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IN THE

Supreme Court of the United States

OCTOBER TERM-1930

No. 552

WILLIAM W. McBOYLE,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

to United States Circuit Court of Appeals for the Tenth Circuit

AND

BRIEF IN SUPPORT OF PETITION

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WILLIAM W. McBOYLE,
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THE UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The petition of William W. McBoyle respectfully shows to this Honorable Court:

—A—

SUMMARY STATEMENT OF THE MATTER INVOLVED

While other points are raised, the first and primary question in this case is one of jurisdiction of the trial court. The

case arose by indictment filed in the District Court of the Western District of Oklahoma, on January 18th, 1928 (R 2), in which this petitioner, William W. McBoyle, was jointly charged with one A. J. "Steve" Lacey, alias Pat Sullivan, under the National Motor Vehicle Theft Act, with transporting an aeroplane, on October 10th, 1926, from Ottawa, in the State of Illinois, to Guymon, in the Western District of Oklahoma, knowing the same to have been stolen.

The pertinent portions of the Act applicable to this case are as follows:

> "408. *Motor Vehicles*—Transportation, Etc., of Stolen Vehicles. This section may be cited as the *National Motor* Vehicle Theft Act. The term '*motor vehicle*' when used in this section, shall include an *automobile, automobile truck, automobile wagon, motorcycle, or any other self-propelled vehicle not designed for running on rails;* * * * Whoever shall transport, or cause to be transported, in interstate or foreign commerce, a *motor vehicle*, knowing the same to have been stolen, shall be punished by a fine of not more than $5,000.00, or by imprisonment of not more than five years, or both. * * * *." (Title 18, Sec. 408, U. S. Criminal Code of Procedure; See Appendix, Page 28).

It will be noted that the word "aeroplane" does not appear in the Act; nor are any similar words, such as aircraft, airship, or flying machine, used. The legality of the indictment, and consequently, the jurisdiction of the trial court, therefore, depends upon the construction placed upon the term "motor vehicle" as used and defined in the Act. In other words, does the language of the National Motor Vehicle Theft Act quoted above include and embrace aeroplanes? The instruction (R. 112) of the trial court to the jury on this point was as follows:

> "It is true that the term aeroplane is not used in this section, but you are instructed the term aeroplane is included in the term 'motor vehicle', as used in this statute."

The majority opinion (R. 171) of the Circuit Court of Appeals for the Tenth Circuit, to which this petition is directed, sustained the contention of the Government and affirmed the trial court on all of the assignments of error, including those raising the question of jurisdiction (R. 150), thus, in effect, holding that the term "motor vehicle" includes aeroplanes (R. 174).

Circuit Judge John H. Cotteral dissented from the majority opinion, holding that an aeroplane is not a motor vehicle within the meaning of the National Motor Vehicle Theft Act, and that the trial court was therefore without jurisdiction. (R. 176).

STATEMENT OF THE FACTS.

The facts are substantially as follows:

The transportation of the plane in question took place from October 6th, 1926, to October 10th, 1926, (R. 16), although the indictment was not filed until about a year later, when the defendant Lacey was apprehended in Montana with a plane subsequently stolen by him from Minneapolis, Minnesota, (R. 35). He was then returned to Oklahoma under warrant charging him with the illegal transportation of the Ottawa, Illinois, plane on which this case is based. Lacey then related his story, admitting the charge and implicating this petitioner in the transportation of the Illinois plane, which led to petitioner's indictment with Lacey in this case. Lacey later pleaded guilty, and was sentenced to serve a year in the penitentiary at Chillicothe, Ohio, (said sentence to run concurrently with a former sentence from the State of Indiana, R. 35). The trial of McBoyle, this petitioner, did not come on until the 24th day of May, 1929, at which time Lacey had been released from the penitentiary under both of his sentences, and appeared as a witness in this case. The Government relied almost wholly on Lacey for its testimony against this petitioner. The situation is clearly indicated by the following comment of the trial court to the jury (R. 116).

"Now, gentlemen, it largely resolves itself into a situation of whether you believe the testimony of the defendant McBoyle, or whether you believe the testimony of Lacey."

Lacey testified that he first met this petitioner, McBoyle, about the 1st of July, 1926; that he was employed by petitioner during the summer as a pilot at $35.00 a week and commission (R. 16); that he stole the plane at Ottawa, Illinois, on October 6th, 1926, and flew it to the petitioner's airport at Galena, Illinois, (R. 17), but states that he did so as the employ of and at the direction of this petitioner (R. 16); that while the plane was being serviced at the port, the petitioner filed off the serial number of the plane (R. 17) and repainted a fitting (R. 18); that he, Lacey, then proceeded West, at the request of petitioner, intending to go to Amarillo, Texas; that he stopped at two or three places en route and in passing over Guymon, Oklahoma, on October 10th, 1926, he noticed a fair and stopped to barnstorm. Some telegrams (R. 21) were there interchanged between Lacey and petitioner, Lacey contending that they had reference to the stolen plane; which is disputed by petitioner (R. 70). Lacey returned to Illinois, leaving the plane at Guymon, and the plane was later returned to Illinois by the owner.

Petitioner testified admitting meeting Lacey about the middle of June, 1926, (R. 53), but denies that he ever employed Lacey at all, (R. 57); stated that Lacey brought a plane with him which he claimed was his own, which later turned out to be a plane stolen in Indiana (R. 56), and which he flew during the summer from petitioner's port as a base, on the commission basis customary to transient pilots; that Lacey left his field before October 6th, 1926, (R. 58). Petitioner specifically denied that he knew anything about or had anything to do with the stealing or transportation of the Ottawa plane, or any other plane, (R. 73). He admitted that Lacey alighted at his port; that his plane was serviced, but denies that he, petitioner, was ever personally about the plane or had anything to do with it,

or knew anything about, the changing of any serial numbers or repainting any parts (R. 72); that Lacey advised him and he believed that he was going to McGregor, Iowa, where there was a prospective student pilot (R. 60); that at the request of Lacey, he was instrumental in directing him to some parties where he got a quantity of liquor, which was taken on board his plane at petitioner's port, (R. 60); that he knew nothing of Lacey's going West to Amarillo, Texas, or anywhere else, (R. 73-74); that he understood and thought the word "stock" in the telegrams had reference to liquor (R. 70), and his own telegrams had that only in mind, and denies that he ever had any agreement, as Lacey claims, relative to any code or the use of the word "stock" (R. 70). Petitioner further testified that upon his return to Illinois, Lacey explained his taking of the plane at Ottawa as a secret arrangement between him and Bridgeman, the President of the Company, which petitioner accepted as the real facts in the case. (R. 65-66).

It is the contention of this petitioner that he is a victim of the circumstances of having had trouble with Lacey when he left his port about the first of October, 1926 (R. 58); of Lacey's having alighted at his port with the stolen plane; of the exchange of telegrams; and of a malicious attempt on the part of Lacey, by false testimony, to involve him in the alleged crime.

At the close of the Government's evidence, petitioner moved the court that the jury be instructed to find for him, as defendant, on a plea of not guilty (R. 48). This motion, together with a demurrer to the evidence, was again entered at the close of all of the evidence in the case (R. 105), all of which were overruled by the court. Other motions and exceptions were made and saved during the trial, as indicated by the assignment of errors to the Appeals Court (R. 150-166). The trial was concluded on May 27th, 1929, the jury returning a verdict finding this petitioner, as defendant, guilty as charged in the indictment (R. 4).

Petitioner then filed his motion for new trial (R. 5), which was heard June 29th, 1929. In this motion petitioner urged consideration of the circumstances that notwithstanding the jurisdiction of the State of Illinois of the larceny of the plane, and of the Federal Court of Illinois, under the National Motor Vehicle Theft Act, he was required to come to Oklahoma, a thousand miles from home where he had never been in his life, and where it was impossible for him to bring witnesses and to be prepared to meet whatever story Lacey might choose to tell; that he had no way of knowing what Lacey would testify to, and was therefore unable to meet the Government's evidence. In support of his motion, petitioner introduced a number of witnesses and numerous affidavits (R. 118-147) strongly refuting most of the evidence of Lacey so for as he implicated this petitioner, and showing false testimony in some instances (R. 133-134). This motion was also overruled by the court and exceptions allowed, (R. 9). Petitioner then filed his motion in arrest of judgment on the ground that the indictment did not state a cause of action or show an offense committed against the laws of the United States, and that the court had no jurisdiction of the subject matter of the action or of the defendant, which was also overruled by the court and exceptions allowed, (R. 9).

Thereupon, on the 29th day of June, 1929, said court sentenced the petitioner to imprisonment in the Federal Penitentiary for a term of three years, and to pay a fine of $2,000.00 (R. 9).

Thereafter, petitioner appealed to the United States Circuit Court of Appeals for the Tenth Circuit to review the judgment and proceedings of the Trial Court on appeal. The following points were raised: (1) Jurisdiction of the Trial Court of the cause of action and person of the defendant (R. 150); (2) Error in introducing certain evidence (R. 151-154); (3) Error in cross examination by the Government (R. 156-159); (4) Abuse of discretion of the Trial Court in overruling defend-

ant's motion for new trial (R. 164). The first and last of these points are urged in this petition.

The Appeals court affirmed the trial court (R. 171), with Circuit Judge Cotteral dissenting on the ground of jurisdiction. In fact, the theory of the Goyernment in this case is clearly indicated by the majority opinion, while the contention of petitioner relative to jurisdiction, is upheld by the dissenting opinion (R. 176).

A certified copy of the entire record of said case in said Circuit Court of Appeals is hereby furnished, attached to and made a part of this application, marked Exhibit "A", in compliance with the rules of this Honorable Court.

This petitioner is advised and believes that said judgment of the United States Circuit Court of Appeals in said case is erroneous, and that this Honorable Court should require the said case to be certified to it for its review and determination in conformity with the provisions of Section 240, Judicial Code (Act of February 13, 1925).

— B —

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The United States Circuit Court of Appeals, Tenth Circuit, erred in sustaining the legality of the indictment and the jurisdiction of the trial court by holding that the term "motor vehicle", as defined and used in the National Motor Vehicle Theft Act, includes and embraces aeroplanes (R. 172-174).

2. The court below erred in sustaining the jurisdiction of the trial court as to the crime charged in the indictment, in that such decision is in conflict with applicable decisions of the United States Supreme Court and of other Circuits involving similar questions.

3. The court below erred in holding that the trial Court had jurisdiction of the cause, notwithstanding the Fifth

Amendment to the Constitution of the United States, which provides:

> "The trial of all crimes * * * * shall be held in the State where the crimes shall have been committed * * *;"

the contention being that if any crime was committed by the petitioner, McBoyle, it was within the State of Illinois.

4. The court below erred in holding that the trial court did not abuse its discretion in overruling petitioner's motion for new trial. (See R. 175; last paragraph; also R. 164; also Assignment 18).

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals, Tenth Circuit, commanding that court to certify and send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record, and all proceedings in the case numbered and entitled on its docket, No. 213, William W. McBoyle, appellant, v. The United States of America, appellee, and that the said judgment of the said Circuit Court may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

WILLIAM W. McBOYLE, *Petitioner.*
BY HARRY F. BROWN,
Guthrie, Oklahoma,
Attorney for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM-1930

No._____

WILLIAM W. McBOYLE,
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vs.

THE UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I

THE OPINION OF THE COURT BELOW

The opinion of the United States Circuit Court of Appeals for the Tenth Circuit was filed August 18th, 1930 (R. 171), and will be reported in 43 Federal (2d), 273.

II

JURISDICTION

1. The jurisdiction of this court is invoked under Section 240 (A) of the Judicial Code, as amended by the Act of February 13th, 1925.

2. The judgment of the Circuit Court of Appeals of the Tenth Circuit, to which the petition herein is directed, was entered by the court September 8th, 1930 (R. 177). (Opinion filed August 18th, 1930; R. 171).

3. The indictment in this case, being one under a Federal Statute (R. 2), the National Motor Vehicle Theft Act, and the primary question being one of the jurisdiction of the trial court of the cause of action, this court has jurisdiction to review the decision of the Circuit Court of Appeals, Tenth Circuit, and to determine the question of jurisdiction, and consequently, any allied questions raised in connection therewith. In addition, the question of jurisdiction, as raised in this case, is especially important as a matter of public interest, as it involves aeroplanes, a new and third method of travel, and the decision will doubtless form a precedent to be followed in construing many other statutes in connection with aeroplanes and aeroplane travel.

In addition, the Appeals Court below was divided in its view, as shown by the majority opinion (R. 171) and dissenting opinion (R. 176).

4. In the following cases this Court assumed jurisdiction and they are cited as authority for the Court to assume jurisdiction in this case:

Fasulo v. United States, 272 U. S. 620; 71 L. Ed., 443. The reasoning of this case, Petitioner maintains, should control in the case at bar. The question is similar—construction of a Federal penal Statute.

The question for decision is whether the use of the mails for the purpose of obtaining money by means of threats of murder or bodily harm is a scheme to defraud.

In United States v. Noveck, 271 U. S., 201; 70 L. Ed. 905, construction of a penal statute was also involved, and the same reasoning applied.

The following cases are also very applicable:

First Nat. Bank of Anamoose v. United States, 206 Fed., 374. (This case is in line with the above mentioned authorities, and applies the rules of construction hereinafter discussed in this brief).

United States v. Wiltberger, 5 Wheat., 76, 95; 5 L. Ed., 37.

Hammerschmidt v. United States, 265 U. S., 182; 68 L. Ed., 968.

United States v. Chase, 135 U. S., 255; 34 L. Ed., 117.

It will be noted that the majority opinion of the Appeals Court below in this case, on the question of jurisdiction, cites no parallel cases as authority, but appears to rest entirely on broad similarities of usage between aeroplanes and automobiles, and one or two very general definitions.

III

STATEMENT OF THE CASE

The statement of the case has been fully covered under heading "A" in the petition, and in the interest of brevity, is not repeated here.

IV

SPECIFICATION OF ERRORS

1. The United States Circuit Court of Appeals, Tenth Circuit, erred in sustaining the legality of the indictment and the jurisdiction of the trial court by holding that the term "motor vehicle", as defined and used in the National Motor Vehicle Theft Act, includes and embraces aeroplanes. (R. 172-174.)

2. The court below erred in sustaining the jurisdiction of the trial court as to the crime charged in the indictment, in that such decision is in conflict with applicable decisions of the United States Supreme Court and of other Circuits involving similar questions.

3. The court below erred in holding that the trial court had jurisdiction of the cause, notwithstanding the Fifth Amendment to the Constitution of the United States, which provides:

> "The trial of all crimes * * * shall be held in the State where the crimes shall have been committed; * * * *"

the contention being that if any crime was committed by the petitioner, McBoyle, it was within the State of Illinois.

4. The court below erred in holding that the trial court did not abuse its discretion in overruling petitioner's motion for new trial. (See R. 175; last paragraph; also R. 164; Assignment 18).

V

ARGUMENT.

The above errors will be concisely discussed in their order.

ERROR 1

The term "motor vehicle" does not include nor embrace the word aeroplane, and the indictment does not state a Federal offense and is therefore void, and the trial court is without jurisdiction.

For convenience, we again quote the definition of motor vehicle as contained in the Act:

> "408 * * * The term 'motor vehicle' when used in this section, shall include an automobile, automobile truck, automobile wagon, motorcycle, or any other self-propelled vehicle not designed for running on rails". (Title 18, Sec. 408, U. S. Crim. Code).

The theories of the Government and of petitioner are clearly indicated by the following excerpts from the majority and dissenting opinions of the appeals court below in this case:

> "We conclude that the phrase 'any other self-propelled vehicle' includes an aeroplane, a motor boat and any other like means of conveyance or transportation which is self-

propelled and is of the same general class as an automobile and a motorcycle." (Majority Opinion, R. 174.)

"I am constrained to hold that aeroplanes were not meant by the Act to be embraced in the designation of motor vehicles, and that the indictment charged no offense against the defendant." (Dissenting opinion, R. 177).

In construing the statute, the following points must be observed:

First: The crime was not one at common law, and since the Courts of the United States do not resort to the common law as a source of criminal jurisdiction, the Government must look wholly to the Act for the foundation of its case.

U. S. v. Eaton, 144 U. S. 677; 36 L. Ed., 591.

Second: The language of the act must clearly indicate the crime charged.

Third: Being a penal statute, the Act must be strictly construed.

Fourth: The Act must be construed in the light of the doctrine of ejusdem generis.

Fifth: The intention of Congress is indicated by the history of the Act in debates, etc.

Sixth: Special legislation relative to aeroplanes.

Petitioner maintains that the Appeals Court below not only erred in its decision that the term "motor vehicle" includes aeroplanes, but that it erred in applying the above well established rules of construction.

The Language of the Act Does Not Clearly Indicate the Crime Charged

"There are no constructive offenses; and, before one can be

punished, it must be shown that his case is plainly within the statute. United States v. Lacher, 134 U. S., 624, 628; 33 L. Ed., 1080, 1083; 10 Sup. Ct. Rep., 625." (Fasulo v. Unitel States, 272 U. S., 620; 71 L. Ed., 443).

"Statutes will not be read to create crimes, or new degrees or classes of crimes, unless the purpose so to do is plain." (United States v. Noveck, 271 U. S., 201; 70 L. Ed., 905).

"Regard is always to be had to the familiar rule that one may not be punished for crime against the United States unless the facts shown plainly and unmistakably constitute an offense within the meaning of an act of Congress. United States v. Lacher, 134 U. S., 624, 628; 33 L. Ed., 1080, 1083; 10 Sup. Ct. Rep., 625; Todd v. United States, 158 U. S., 278, 282; 39 L. Ed., 982, 983; 15 Sup. Ct. Rep., 889; Fasulo v. United States, 272 U. S., 620, 629; 71 L. Ed., 443, 445; 47 Sup. Ct. Rep., 200." (Donnelley v. U. S., 276 U. S., 511; 72 L. Ed., 678).

"(1) The statute creates and denounces a new offense. A penal statute which creates a new crime and prescribes its punishment must clearly state the persons and acts denounced. * * * An act which is not clearly an offense by the expressed will of the legislative department before it was done may not be lawfully or justly made so by construction after it is committed, either by the interpolation of expressions or by the expunging of some of its words by the judiciary. Ex post facto construction is as vicious as ex post facto legislation.

* * *

The apparent and natural meaning of the terms of a statute is always to be preferred to any curious or hidden signification reached by the reflection and ingenius reasoning of unusually strong and acute minds." (First Nat. Bank of Anamoose v. United States, 206 Fed., 374).

The Act does not contain the word "aeroplane"; neither does it contain any similar words, such as "aircraft," "airship," "flying machine," etc. On the other hand, the specific terms used in the Act apply only to automobiles and like con-

veyances. In order, therefore, for an aeroplane to be embraced in the Act, it is necessary to read the word "aeroplane" or some similar word into it by judicial construction of the definition of a "Motor vehicle" as contained therein.

The word "vehicle" and the term "motor vehicle" in so far as they apply to conveyances, have been applied universally to vehicles that travel on land, both in their common and legal usage.

The following definitions of "vehicle" are pertinent here:

"4. 'Vehicle', as Including All Means of Land Transportation. The word 'vehicle' includes every description of carriage or other artificial contrivance used, or capable of being used, as a means of transportation on land. Sec. 4, Title 1, of the U. S. Code."

"Vehicle 1. That in or which anything is or may be carried; especially a contrivance with wheels or runners for carrying something. A conveyance as a carriage, wagon or car; SPECIFIC, IN LAW, ANY ARTIFICIAL CONTRIVANCE USED OR CAPABLE OF BEING USED AS A MEANS OF TRANSPORTATION ON LAND." Standard Dictionary Ed., 1928.

Cyc. states:

"Vehicle. Any carriage moving on land, either on wheels or on runners; * * * " (39 Cyc., 1125.)

The footnote to the above text on vehicles reads as follows:

"The term is rarely applied to water craft and does not therefore apply to a ferry-boat." (Duckwell v. New Albany, 25 Ind., 283, 286.)

"Railroad cars which only run on a permanent, continuous and connecting track are not 'vehicles' in the ordinary and usual sense of the term." (Baltimore, etc., R. Co. v. District of Columbia, 10 App. Cas.) (D. C. 111, 120.)

The opinion of the court below cites the definition of

"vehicle" in the Century Dictionary, as follows:

> "F. Vehicle, L. Vehiculum", meaning a 'conveyance, carriage, ship.' It defines the word as, 'Any receptacle, or means of transportation, in which something is carried or conveyed or travels." (R. 172.)

The above definition, however, is followed by the following definition:

> "Esp. A carriage or conveyance moving on wheels or runners;" • • •

Definition and use of the term "Motor Vehicle"

This term apparently came into existence with the automobile, and in its legal and common usage has been entirely confined to the automobile and like motor-driven conveyances that travel on the ground.

VOLUME 28 OF "CYC", copyrighted in 1908, devotes some 30 pages to the subject of "motor vehicles". In this article, the term is used synonymously with the word "automobile", and like vehicles, and is confined exclusively to such conveyances.

IN VOLUME 42 OF CORPUS JURIS, copyrighted in 1927, eight years after the passage of the National Motor Vehicle Theft Act, 843 pages (563 to 1410) are devoted to the subject of "motor vehicles". In the 800 pages of this exhaustive discussion, nothing but automobiles and like conveyances that run upon the ground are discussed or referred to. A cursory examination of each page of the article indicates that the word "aeroplane" was never used in the text nor in the numerous notes on each page. The author seems to assume as a matter of course, that the term "motor vehicle" applies only to automobiles and like conveyances.

VOLUME 2 OF CORPUS JURIS, on the other hand, treats of "Aerial Navigation". An examination of the ten pages of this article and the numerous notes accompanying it, so far as we

are able to find, does not disclose the use of the term "motor vehicle" even once. It is simply not thought of in that connection.

In Ruling Case Law, Vol. 19, Page 677, the following index appears: "Motor Vehicles. See automobiles, Vol. 2, p. 1164."

The New International Encyclopedia, in Vol. *16*, copyrighted in 1917, devotes 13 pages (337 to 350) to the discussion of the subject of "motor vehicles". It defines the term as follows:

"Motor Vehicle (Ger. Motor-Wagon). 'A carriage for the transportation of passengers or a truck for transportation of freight, fitted to run on streets and highways without a track. * * * *"

The above definition is followed by an exhaustive discussion, both historic and scientific, of automobiles and like conveyances that run upon the ground, with many drawings of automobiles, etc. But there seems to be no reference that would in any way connect the term "motor vehicle" with any form of aircraft.

Volume 1, of the International Encyclopedia, pages 172 to 187, on the other hand, treats of "Aeronautics", but the term "motor vehicle" is never used therein.

The Air Commerce Act of the United States (Sec. 176-1 to 176-14, Title 49, U. S. Code), approved May 20, 1926, seven years after the passage of the National Motor Vehicle Theft Act, never in any instance makes use of the term "motor vehicle." It uses a terminology distinctly belonging to airplanes, such as "aircraft," "airspace," "airworthiness," "air navigation," "airports," and "navigable airspace." It also has the following provision relative to the words "vessel", and "vehicle":

"(a) The navigation and shipping laws of the United

States, including any definition of "vessel," or "vehicle," found therein * * * shall not be construed to apply to seaplanes or other aircraft. (Title 49, Sec. 176, U. S. Code.)

IN THE STATUTES OF THE VARIOUS STATES, the laws applicable to automobiles and like conveyances are invariably listed under the subject of "motor vehicles."

In Kansas, for instance, Chapter 206, Statutes of 1925, begins as follows:

"Section 1. (a) The term 'motor vehicle,' when used in this act, means any automobile, automobile truck, motor bus, or any other self-propelled vehicle not operated or driven upon fixed rails or track."

In the Code of Iowa, 1927, 251, entitled "motor vehicle and law of Road," a motor vehicle is defined as follows:

"1. The term 'motor vehicle' shall include all vehicles, propelled by any power other than muscular power except traction engines, road rollers, and such vehicles as are run only upon tracks or rails."

An examination of the statutes of some fifteen or twenty of the states, including Massachusetts and New York, shows that the subject is treated in a similar manner, under the term "motor vehicles," and it is reasonable to conclude that it is likewise true of the other states.

The above definition from Kansas is almost identical with the definition found in the National Motor Vehicle Theft Act, but it could not possibly be construed to apply to airplanes, as the act treats of regulations peculiar to automobiles and like conveyances that use the roads, with no thought otherwise.

The Court below quotes as authority in construing the term "motor vehicle," Corpus Juris, Volume 42, page 609, Sec. 1, (R. 173) which reads as follows:

"A 'motor vehicle' is a vehicle operated by a power devel-

oped within itself and used for the purpose of carrying passengers or materials; and as the TERM IS USED IN THE DIFFERENT STATUTES regulating such vehicles, it is generally defined as including all vehicles propelled by any power other than muscular power, except traction engines, road rollers, and such motor vehicles as run only upon rails or tracts.

The real meaning of the definition is determined, however, by the authorities on which it is based. An examination of these authorities shows that invariably the subject matter has to do with automobiles or like conveyances that run on the ground. Then too the definition is followed by 800 pages of data dealing entirely with principles, statutes and decisions concerning automobiles, and like vehicles, and none of which apparently deal with aircraft, directly or indirectly. This situation certainly eliminates aeroplanes or aircraft of any kind from classification under the above definition of a "motor vehicle."

THE RULE OF STRICT CONSTRUCTION APPLIES TO THIS ACT.

"301. General Rules. It has long been the well settled general rule that penal statutes are subject to the rule of strict construction. They will not be construed to include anything beyond their letter even though within their spirit, and nothing can be added to them by inference or intendment." (25 R. C. L. 1081).

In view of the fact that Congress, in enacting the Act, failed to use the word "aeroplane," or any similar word that indicates an intention to make the Statute applicable to aeroplanes, and since the term "motor vehicle," has universally been applied to automobiles and other vehicles running upon the ground, petitioner maintains that the application of the above rule eliminates aeroplanes from consideration in construing the act. But there is a further rule to consider that should eliminate all question.

The doctrine of Ejusdem Generis.

This doctrine is well defined by "Cyc."

"(11) Doctrine of Ejusdem Generis. By the rule of construction known as 'ejusdem generis,' where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated. * * * (36 Cyc. 1119).

"2. Statutes—Construction—Ejusdem Generis—Definition of Crime. The rule that, where general words follow the enumeration of particular classes of persons or of acts, the general words should be construed to apply to persons or acts of the same general nature or class of those enumerated, is especially applicable to statutes defining crimes and regulating their punishment." (Opinion, Circuit Judge Sanborn, First Nat. Bank of Anamoose, v. U. S., 206 Fed., 374).

The following case applies the doctrine in a manner most applicable to this case:

"This aeroplane as operated by Whitted cannot be called a common carrier of passengers. It cannot be designated a public conveyance, provided by a common carrier for passenger service only, as the policy contract contemplated. The connection in which these general words are used with the other conveyances mentioned in the policy contract strengthens this conclusion. The conveyances mentioned in the policy are 'railroad car, steamboat, automobile, omnibus, or cab'; and then follows the more general words or phrase, 'or other public conveyance provided by a common carrier for passenger service only'. THIS AEROPLANE IS NOT A CONVEYANCE OF THE SAME KIND OR SPECIES AS THE OTHERS ENUMERATED IN THE POLICY CONTRACT. IT WAS USED TO FLY IN THE AIR; AND THE OTHER CONVEYANCES ENUMERATED ARE USED ON LAND OR WATER." No. Am. Acci. Ins. Co. v. Pitts (Ala.), 104 So. 21, 40 A. L. R., 1171."

The words of the statute to which this doctrine is applicable are as follows:

> "The term 'motor vehicle' when used in this section, shall include an automobile, automobile truck, automobile wagon, motorcycle, OR ANY OTHER SELF PROPELLED vehicle not designed for running on rails."

Under this doctrine the phrase "any other self propelled vehicle not designed for running on rails" must be confined in its application to the general class of vehicles to which the words "automobile, automobile truck, automobile wagon, motorcycle", belong.

The important thing about an aeroplane that differentiates it from all other modes of travel is the fact that it flies,—not that it moves by means of a motor. The aeroplane is thus placed in a class by itself. The dissenting opinion in the court below states this most forcibly:

> "It would have been a simple matter in enacting the statute to insert as descriptive words, airplanes, aircraft, or flying machines. If they had been in the legislative mind, the language would not have been expressed in such uncertainty as 'any other self-propelled vehicle not designed for running on rails.' The omission to definitely mention airplanes requires a construction that they were not included. Furthermore, by excepting vehicles running on rails, the meaning of the Act is clarified. These words indicate it was meant to be confined to vehicles that run but not on rails, and it did not extend to those that fly. Is it not an unreasonable view that airplanes fall within the description of self-propelled vehicles that do not run on rails? The question is its own answer." (R. 176).

The majority opinion of the court below states (R. 173, last paragraph):

> "Furthermore, some meaning must be ascribed to the general phrase 'any other self propelled vehicle', which Congress wrote into the Act. IT SPECIFICALLY ENUMERATED

ALL OF THE KNOWN SELF-PROPELLED VEHICLES DESIGNED FOR RUNNING ON LAND."

In this, the court below would seem to be in error. There are a number of other words of rather common usage applying to automobiles and like conveyances, such as "motor car", (Ency. Brittanica), "motor bus", (Winston's Enc. 1929, Vol. 7), "motor carriage", (Appelton's new Pract. Ency. 1920, Vol. 4), "bus", "car", "roadster", "coupe", "phaeton", "sedan", "lemousine", "brougham", (See Cut. Standard Dictionary, 1618-1619).

It is obvious, therefore, that Congress intended the phrase "any other self-propelled vehicle not designed for running on rails" as a catch-all to include, in addition to the words "automobile, automobile truck, automobile wagon and motorcycle", any new trade or coined names that might be applied to the same or similar conveyances, such as those last mentioned above.

The opinion of the court below is so sweeping as to include not only aeroplane, but a motor boat. The same reasoning would include a Zeppelin as a "motor vehicle", since it is propelled by motors. This reasoning is untenable.

Land travel has its own terminology, such as "wagons", "carts", "automobiles", "motor vehicles", "cars", "trains", etc.; water travel has its own terminology, such as "vessels", "ships", "motor boats", "liners", etc. It remained for the Twentieth Century to develop the first new mode of travel in history,—that by air. This new method of travel is likewise developing a new terminology of its own, such as "aeroplanes", "airships", "flying machines", "Zeppelin", etc. It is confined neither to land nor to water in its operations. Colonel Lindbergh used the same aeroplane in crossing the Atlantic that he used in flying over North and South America. It is obvious, therefore, that the aeroplane can not be classed either with automobiles or motor boats, and is not a "motor vehicle" within the meaning of the Act.

The Purpose of Congress is conclusively shown by the Debates

"That such was the purpose is established by the Congressional Debates. 58 Cong. Rec. pt., 5, pp. 4577-4585; 66 Cong. 1st Sess." (Work v. Braffet, 276 U. S., 560, 566; 72 L. Ed., 700, 703).

The debates in connection with the passage of this Act show conclusively that it was not the purpose of Congress to include aeroplanes. Some fifteen or twenty members in the House and Senate took part in the discussion, including Mr. Dyer, Author of the Act, and Senators Cummins, Brandegee and Hitchcock. The word "aeroplane" does not appear once, nor is there any reference, directly or indirectly to aircraft of any kind. On the other hand, by actual count, the word "automobile" appears more than eighty times.

The following short quotations are from the remarks of Mr. Dyer, author of the Act, and are indicative of the thoughts expressed generally:

"It provides, gentlemen, for only two things. Section 3 provides for the punishment of a thief stealing a car and transporting it from one state to another. Section 5 provides for the receipt of the stolen car by thieves in another state for the purpose of selling and disposing of it." (Cong. Rec. Vol. 58, Pt. 6, 5472).

"This bill has been given very careful consideration by the Committee on the Judiciary. The full committee, with the earnest desire to present to the House a measure that would as far as possible wipe out the numerous stealings of automobiles, gave most careful consideration to the same. (Page 5472).

"At the present time there is a great emergency demanding this kind of legislation. In the United States at this time there are in use approximately 6,500,000 automobiles. During the past year the number of thefts of automobiles has been very large throughout the United States, and particularly in cities of the Middle West. * * * It is getting so now that it is difficult for the owners of the cheaper cars to obtain theft

insurance, due to the great loss that insurance companies have sustained. During the past year automobile insurance on this class of cars has increased 100 percent." (Page 5470). (See Appendix for further quotations.)

None of the reasons advanced for enacting the law applied to aeroplanes, and do not apply today. Perhaps in the whole ten years since the passage of the law, there have not been a half dozen aeroplanes stolen and transported. The larceny laws of the various states are now and perhaps always will be amply sufficient to take care of the theft of aeroplanes, without the aid of the Federal Courts. (The House debates appear on pages 5470 to 5478, Vol. 58, part 6, Cong. Rec.; the Senate debates on pages 6433 to 6435, Vol. 58, part 7.

Air Commerce Act of 1926

The term "motor vehicle" does not appear in this Act; in addition, by its provisions, the National Government assumes regulatory powers of aircraft and pilots to such an extent that the theft of planes is bound to be negligible. The Dyer Act, including the National Motor Vehicle Theft Act, the white slave act, etc., seems to apply only to subjects over which the Federal Government has no regulatory powers but where violations of law have gotten beyond the control of the states owing to interstate transportation.

In view of the foregoing reasons, petitioner submits that the term "motor vehicle" can not properly be construed to apply to aeroplanes, that the indictment does not state a Federal offense, and that the Circuit Court below is in error in so holding; and that the dissenting opinion in the case correctly states the law.

ERROR 2.

The Court below erred in that its decision is not in accord with applicable decisions of the Supreme Court and other Circuit Courts.

An examination of the majority opinion of the court below shows that the portion of the opinion holding that an aero-

plane is enibraced within the term "motor vehicle" is based on a rather loose definition of the word "vehicle" (R. 172), and of "motor vehicle" as defined by Corpus Juris, Volume 42, Page 609, R. 173, and upon the similarity of the purposes of the aeroplane and automobile. The opinion does not cite a case where this or other courts have passed upon a parallel situation in the same way.

On the other hand, the following cases, petitioner believes, sustain his contention in this case so fully that they should have controlled the decision.

Fasulo v. United States, 272 U. S., 620; 71 L. Ed., 443.

United States v. Noveck, 271 U. S. 201; 70 L. Ed., 905.

First Nat. Bank of Anamoose v. U. S., 206 Fed., 374.

Petitioner therefore maintains the court below erred in that its decision is contrary to the foregoing applicable decisions.

ERROR 3.

The court erred in holding that the trial court had jurisdiction of the cause notwithstanding the Fifth Amendment to the Constitution of the United States, providing that "the trial for all crimes * * * shall be held in the state where the crimes shall have been committed * * * ".

It is the contention of the petitioner that even assuming that he did the acts complained of, which he specifically denies, the jurisdiction of the crime was in the State of Illinois. As shown by the statement of facts, the defendant McBoyle was never in the plane, had nothing to do with its actual transportation, and was never out of the State of Illinois. The record fails to show, even on the Government's theory, that petitioner intended for the plane to be brought to Oklahoma.

The Statute provides:

"Whoever shall transport or cause to be transported in interstate or foreign commerce", etc.

It also provides:

> "Any person violating this section may be punished in any district in or through which such motor vehicle has been transported or removed by such offender."

There are a number of decisions that hold or tend to hold that persons charged with penal acts in connection with the interstate transportation of goods, may be tried at the destination of goods or articles instead of at the point of shipment as in post office cases. There seems to be a difference in these cases in this, that the evidence shows that the particular jurisdiction of the court included the point of intended destination. In this case, on the Government's theory, Lacey went to Oklahoma without petitioner's knowledge or consent. He could just as well have gone to the State of Maine or the State of Washington, in which event, petitioner would have been required to go two or three thousand miles from his home, and the place where his alleged acts took place, for trial.

This system, it seems to us, violates every principle of natural justice and right; and also violates the provisions of the Sixth amendment to the Constitution of the United States, quoted above, and likewise of the Fifth Amendment, which provides that:

> "No person * * * shall * * * be deprived of life, liberty or property without due process of law, * * * *."

Under the Government's theory, that petitioner instructed Lacey to take the aeroplane from Illinois, jurisdiction could be fastened upon him in any State of the Union where Lacey decided to fly, regardless of whether he (McBoyle) intended such transportation to be made.

This is stretching the matter of jurisdiction too far. Petitioner maintains that if the court finds the National Motor Vehicle Theft Act embraces aeroplanes, that the Federal Court of Illinois only had jurisdiction of the cause and of the defendant.

ERROR 4.

The court below erred in holding that the trial court did not abuse its discretion in denying defendant's motion for new trial.

At the hearing of the motion for new triel, petitioner introduced a mass of evidence, both of personal witnesses and by affidavits, which tended strongly to controvert the story of Lacey in almost every particular, and which showed that he falsified his testimony in some material points, especially with regard to his discharge from the Marines. (R. 133 to 134).

In view of the fact that the Government's case was based primarily on the testimony of an accomplice, and since petitioner was required to leave the State of Illinois and come to Oklahoma, almost a thousand miles, without knowing what evidence he was to meet until the co-defendant told his story on the stand; and in view of the very remarkable quality and extent of the evidence introduced on the hearing of the motion for new trial, as shown by the record, pages 118 to 147, tending strongly to show the story of Lacey false, and that the petitioner is innocent, petitioner maintains that the trial court abused its discretion in denying this motion.

CONCLUSION

It is, therefore, respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers in order that the jurisdiction of the trial court of the cause of action and of the defendant, may be determined, and in order that the National Motor Vehicle Theft Act may be construed as to its application to aeroplanes; and that to such an end, a writ of certiorari should be granted, and this court should review the decision of the United States Circuit Court of Appeals for the Tenth Circuit, and finally reverse it.

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Counselor for Petitioner.

APPENDIX

The National Motor Vehicle Theft Act (the Dyer Act) reads as follows:

408. MOTOR VEHICLES—TRANSPORTATION, ETC., OF STOLEN VEHICLES. This section may be cited as the National Motor Vehicle Theft Act. *The term 'motor vehicle' when used in this section, shall include an automobile, automobile truck, automobile wagon, motorcycle, or any other self-propelled vehicle not designed for running on rails;* the term 'interstate or foreign commerce' shall include transportation from one state or territory, or the District of Columbia, to another state, territory, or the District of Columbia, or to a foreign country, or from a a foreign country to any state, territory, or the District of Columbia. *Whoever shall transport, or cause to be transported, in interstate or foreign commerce, a motor vehicle, knowing the same to have been stolen, shall be punished by a fine of not more than $5,000.00, or by imprisonment of not more than five years, or both.* Whoever shall receive, conceal, store, barter, sell, or dispose of any motor vehicle, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be punished by a fine of not more than $5,000.00, or by imprisonment of not more than five years, or both. Any person violating this section may be punished in any district in or through which such motor vehicle has been transported or removed by such offender; (Title 18, Sec. 408, U. S. Criminal Code of Procedure).

EXCERPTS FROM DEBATES IN CONGRESS DURING ENACTMENT OF THE NATIONAL MOTOR VEHICLE THEFT ACT

(House debates appear on Pages 5470 to 5478, Vol. 58, Part 6, of the Congressional Record; and the Senate debates appear on Pages 6433 to 6435, Vol. 58, Part 7).

"MR. DYER: It provides, gentlemen, for only two things. Section 3 provides for the punishment of a thief stealing a car and transporting it from one state to another. Section 4 provides for the receipt of the stolen car by thieves in another state for the purpose of selling and disposing of it" (Cong. Rec. Vol. 58, Part 6, page 5472).

* * * * * * * * * * *

"This bill has been given very careful consideration by the Committee on the Judiciary. The full committee, with the earnest desire to present to the House a measure that would as far as possible wipe out the numerous stealings of automobiles, gave most careful consideration to the same. Prior to doing so it was considered by a subcommittee of the Committee on the Judiciary, and after its consideration by the full committee and after a number of meetings changes were made in it from time to time, and the bill as finally agreed upon was introduced by me and given its present number. But prior to this the bill had been considered in substantially the same form for some time, and at a meeting some time ago the Committee on the Judiciary directed that my bill be reported to the House favorably and unanimously."

* * * * * * * * * * *

"At the present time there is a great emergency demanding this kind of legislation. In the United States at this time there are in use approximately 6,500,000 automobiles. During the past year the number of thefts of automobiles has been very large throughout the United States, and particularly in some cities of the Middle West. In Chicago 2,500 thefts of this kind have occurred. St. Louis has had 2,241 automobiles stolen, and other cities in proportion. * * * It is getting so now that it is difficult for the owners of the cheaper cars to obtain theft insurance, due to the great loss that insurance companies have sustained. During the past year automobile theft insurance on this class of cars has increased 100 per cent. It is automobiles of that price that are generally stolen. Automobile thieves who make a spe-

cialty of this crime do not steal many of the higher-priced cars, the reason being, of course, that they are not so easily sold. * * * Thieves have found the automobile field one in which they can reap huge harvests, due to the fact, no doubt, that there are so many automobiles now in use in the United States" (Cong. Record, pp. 5470-5471).

"MR. REAVIS: Bearing in mind that the offense defined by this measure is the transportation of a *stolen automobile* from one State to another, * * * " (Cong. Record, Vol. 58, part 6, p. 5472).

"MR. BEE: Another suggestion that occurs to me is why single out automobiles? I make no appeal merely because it is an automobile, for the automobile is the vehicle of everybody. But why should a man be permitted to take a carload of cattle and transport them from Texas to Missouri and have the authorities go through the slow process of extradition by the governor before he can be brought back into the State of Texas? Why should we not include a carload of grain that might be stolen, or a bale of cotton, or a carload of hogs, or hundreds of other things that might be mentioned, * * * " (Cong. Record, Vol. 58, part 6, p. 5474).

"MR. CUMMINS: I ask unanimous consent for the present consideration of the bill (H. R. 9203) to punish the transportation of stolen motor vehicles in interstate or foreign commerce."

"MR. SMOOT: Let the bill be read.

* * * * * * * * * * *

"MR. CUMMINS: This is a House bill, and the Senate committee accepted in the main the work of the House. I see no substantial objection, however, to the point made by the Senator from Connecticut. The practice is to steal an automobile close to a State line and run it across the State line. The first section is intended to punish anyone who does that thing, knowing the vehicle to have been stolen. The further

practice is, if possible, to dispose of the vehicle to some other party, confederate, or otherwise, when it gets across the State line, and section 4 is for the purpose of punishing a man who barters or sells or disposes of the property with intent to deprive the owner of the possession thereof, or if he conceals it knowing it to have been stolen. I think that would probably embrace every case that could be reached.

"MR. HITCHCOCK: I realize that what the Senator says is true; but it seems to me a large number of automobile thefts are chiefly for the purpose of sale; most of the men who steal automobiles sell them; it is a regular business. If every sale must be under a certificate and must be registered, without any regard to interstate commerce or passing from one State to another, it seems to me it might be possible to put a stop to that illegitimate business". (Cong. Rec. Vol. 58, Part 7, pages 6434 and 6435).